UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Regional Transit Authority Transit Services, Inc., Plaintiff,	)	
vs.	)	Case No. 11CV40222-FDS
Amalgamated Transit Union, Local 22, Defendant.	)	

BEFORE: The Honorable F. Dennis Saylor, IV

Motion Hearing

United States District Court
Courtroom No. 2
595 Main Street
Worcester, Massachusetts
February 13, 2012

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E X H I B I T S

P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable F. Dennis Saylor, IV, United States District Judge, United States District Court, District of Massachusetts, at the Donohue Federal Building & United States Courthouse, 595 Main Street, Worcester, Massachusetts, on February 13, 2012.)

14:24:51 THE CLERK: All rise.

14:24:51 Court is now open. You may be seated.

14:24:52 Case No. 11-40222, Regional Transit Authority versus Amalgamated Transit Union, Worcester Local 22.

14:24:56 Counsel, please note your appearance for the record.

14:25:05 MS. ROZAK: Good afternoon, your Honor. My name is Kimberly Rozak. I'm here on behalf of Plaintiff, RTA Transit Services, Inc., and along with me is Attorney Michael Murphy. We're from Mirick, O'Connell.

14:25:08 THE COURT: All right. Good afternoon.

14:25:10 MR. GOLDBERG: Good afternoon, Judge. Gary Goldberg on behalf of the defendant, Local 22.

14:25:10 THE COURT: All right. Good afternoon.

14:25:12 All right. This is a hearing on the Union's motion to dismiss.

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14:25:36 Mr. Goldberg, I'll hear from you first.
14:25:40 MR. GOLDBERG: Thank you, your Honor.
14:25:41 The Union finds itself in a rather unusual
14:25:48 position today. Typically, we're here because we have
14:25:53 been accused of not adhering to the contract, and the
14:25:58 Court is admonishing that we should have gone to
14:26:02 arbitration.
14:26:03 Today, the opposite has occurred, and we're
14:26:05 trying to go to arbitration, and the employer is
14:26:08 attempting to block us from doing so. We're seeking
14:26:11 this declaratory relief permanently barring the Union
14:26:15 from bringing forth this grievance to arbitration, and
14:26:19 they're arguing that the contract does not provide for
14:26:22 such access to arbitration for demotions of its members.
14:26:27 And the relevant clause within the contract includes a
14:26:31 discipline clause where it's defined as discipline to
14:26:36 include written warnings, suspensions, and discharge.
14:26:38 The motion is not defined by the contract,
14:26:44 and it is for that very reason that the Union contends
14:26:48 that the RTA has exceeded its authority and has filed
14:26:52 its grievance under the collective bargaining agreement.
14:26:56 During the investigation of this matter by
14:26:57 the RTA, Mr. Rossi, who is the individual who has been
14:27:02 demoted, was told that all infractions are under
14:27:06 investigation leading to steps of progressive discipline

14:27:09 up to and including discharge from service.

14:27:12 After they completed their investigation,
14:27:15 they demoted Mr. Rossi in lieu of discharge due to his
14:27:19 length of service. However, as a result of that
14:27:23 demotion, his seniority, his bidding rights and even
14:27:28 pension rights have all been negatively impacted.
14:27:31 Hence, the reasons why we believe that arbitration is
14:27:35 the appropriate remedy.

14:27:37 The grievance procedure in this case is a
14:27:40 broad one, and it's important to the outcome of this
14:27:42 case. It -- it applies to all disputes between the
14:27:47 parties; and by having this broad arbitration clause, it
14:27:51 raises this presumption of arbitrability.

14:27:55 THE COURT: Let me stop there.

14:28:02 It says, "The grievance procedure shall
14:28:04 apply to all disputes arising between the Union and the
14:28:07 Company," et cetera.

14:28:10 Does that mean literally all disputes or all
14:28:15 disputes arising under the collective bargaining
14:28:17 agreement?

14:28:18 MR. GOLDBERG: I think it -- it does not
14:28:21 require, as far as the Union is concerned, that there be
14:28:24 a specific provision dealing within the contract that it
14:28:30 allows for all disputes that would arise between the
14:28:32 parties.

14:28:33 THE COURT: Okay.

14:28:39 MR. GOLDBERG: The issue of this presumption of arbitrability, as relies back to the broad arbitration clause, the courts have indicated that there is two ways for the employer to demonstrate that this presumption of arbitrability should be set aside.

14:28:59 One is whether or not there is specific language within the contract that excludes it, this particular matter, and there is a generic demand of rights clause, which simply preserves any rights not modified specifically under the agreement is reserved to the employer.

14:29:20 THE COURT: Well, again, reading those two together, I'm struggling with this because it's not the clearest most coherent document. You say anything is covered -- any dispute is covered by the grievance procedure, which suggests that management hasn't really reserved any rights at all, right? In other words, what does that phrase mean if all disputes arising between a union or a union member and the company are covered in the grievance procedure?

14:29:56 MR. GOLDBERG: For example, you know, if there is issues involving, you know, things that are traditionally reserved to the employer, whether it be in terms of the operation of their business that is not

14:30:09 specifically set aside within the contract, arguably
14:30:14 that would be reserved to management within the
14:30:17 management rights clause. Here we have a situation
14:30:19 involving an individual employee who has been demoted.
14:30:24 THE COURT: In other words, let's say that
14:30:29 management decided to paint all of the buses bright
14:30:33 pink, and the Union said, good Lord, I don't want to
14:30:36 drive a bright pink bus; they're hideous. I'm not
14:30:42 trying to use a silly example here to illustrate the
14:30:45 point. That might be a dispute arising between the
14:30:47 Union and the Company. The workers are upset at the
14:30:50 ugly color of the buses.
14:30:53 Would that be an arbitrable dispute or would
14:30:56 that come within the management rights clause?
14:30:58 MR. GOLDBERG: I do not believe that that
14:31:00 would be an arbitrable dispute.
14:31:02 THE COURT: And the reason it wouldn't is
14:31:03 because it's not covered by the CBA, right?
14:31:05 Now, there is nothing in the CBA that says,
14:31:07 you know, the Union has a say in what color the buses
14:31:10 ought to be.
14:31:11 MR. GOLDBERG: Right. It doesn't -- it
14:31:12 doesn't directly impact the terms and conditions of
14:31:16 their employment.
14:31:16 THE COURT: You know, in a way it does --

14:31:17 MR. GOLDBERG: Well --
14:31:18 THE COURT: -- but I mean everything
14:31:19 arguably impacts --
14:31:20 MR. GOLDBERG: Right.
14:31:21 THE COURT: -- conditions of employment.
14:31:23 And the reason I'm asking that question is it sort of
14:31:25 backs into discipline. You know, the $64,000 question
14:31:29 is is discipline only consist of written warnings,
14:31:32 suspensions or terminations, or other actions against an
14:31:35 employee, and -- in other words, if -- if all that is
14:31:43 arbitrable is that covered by the CBA, and the CBA says
14:31:47 discipline is only these three things, then a fourth
14:31:51 thing arguably is not covered by the CBA, right?
14:31:54 MR. GOLDBERG: I don't think that that would
14:31:56 be true.
14:31:56 THE COURT: Okay. Walk me through that
14:31:58 then.
14:31:58 MR. GOLDBERG: The argument would be that
14:32:00 they have exceeded their authority within that clause.
14:32:04 The fact that they cannot issue discipline, the demotion
14:32:07 as a discipline, they've exceeded their authority under
14:32:11 the agreement. It has not been specifically reserved in
14:32:15 the managing rights clause, and it's subject to whether
14:32:19 or not that -- to arbitration whether or not they have,
14:32:22 in fact, exceeded that -- that authority. I mean,

14:32:24 if -- if that wasn't the case then any time that the
14:32:29 Union claimed that the employer has exceeded their
14:32:31 authority would never get resolved to arbitration.
14:32:36 So it does involve the interpretation of
14:32:39 that agreement as to whether or not the discipline
14:32:41 includes that level of demotion; and if it does not,
14:32:45 then whether or not that the company is still warranted
14:32:48 in demoting him, or whether they have exceeded their
14:32:51 authority under the agreement.
14:32:53 THE COURT: So you're saying that the only
14:32:54 forms of discipline are these three things?
14:32:56 MR. GOLDBERG: That's what the -- well,
14:32:58 there is a verbal warning, and that doesn't rise to the
14:33:00 level of discipline that has been identified. It
14:33:03 doesn't go into the personnel file.
14:33:05 THE COURT: Even if paradoxically that would
14:33:08 mean employees might be worse off, rather than being
14:33:10 demoted, they have to be fired, because that's not one
14:33:13 of the options?
14:33:13 MR. GOLDBERG: There is language in the
14:33:15 agreement that talks about the process dealing with
14:33:18 someone who gets promoted from job A to job B; and if
14:33:22 they don't work out, in the opinion of the employer,
14:33:25 they would get back to their old job. So in that sense,
14:33:29 the word "demotion," although that word is not used,

14:33:32 it's considered within the agreement, and that has been
14:33:35 the only place where it has been considered within the
14:33:39 agreement.
14:33:39 THE COURT: Okay.
14:33:42 MR. GOLDBERG: So, the -- the premise where
14:33:45 I was at was the fact that if this presumption of
14:33:49 arbitrability exists dealing with this broad arbitration
14:33:54 clause, the company has the burden then to demonstrate
14:33:57 that there is some specific language that would require
14:34:01 this carveout, or this reservation, which there is no
14:34:06 such language.
14:34:07 The actual case that they relied upon, there
14:34:09 was a case in reference to Trap, the Trap case, which
14:34:15 they cited in their brief supporting their argument. In
14:34:19 that particular case, the Third Circuit had indicated
14:34:22 that the managers rights clause there allowed for
14:34:27 reservation of rights to be associated with discharge
14:34:31 and demotion as related back to qualifications and
14:34:35 performance. And that would not be subject to the
14:34:38 arbitration provision.
14:34:39 And the -- that Court went on to say that
14:34:42 this is atypical, that typically if there is a broad
14:34:47 management rights clause -- a broad grievance procedure
14:34:51 and a generic manager rights clause, then such a
14:34:56 reservation would not exist, and the matter would be

14:34:58 going to arbitration.

14:34:59 The second way for them to argue that the
14:35:02 presumption of arbitrability should go away is that
14:35:07 there's got to be some language that is the most
14:35:13 forceful purpose is the way that the courts referred to
14:35:16 it. The most forceful purpose that to exclude this from
14:35:21 arbitration. And there is none. This is simply a
14:35:24 matter of interpretation of the contract as to whether
14:35:26 they exceeded their authority.

14:35:28 And the -- the Supreme Court in -- in the
14:35:33 Warrior and Gulf case going back to 1960, you know,
14:35:36 addressed this issue specifically on point and cautioned
14:35:40 the lower courts that they should view with suspicion an
14:35:45 attempt to persuade it to become entangled in the
14:35:49 construction of the substantive provisions of the labor
14:35:52 agreement even through back door of interpreting the
14:35:56 arbitration clause where the alternative is to use the
14:35:59 services of an arbitrator.

14:36:01 So, we have the presumption of
14:36:05 arbitrability. It has not gone away. There's no
14:36:10 specific language that would exclude it, and there's no
14:36:13 purposeful or forceful action or evidence that the
14:36:17 employer can offer. But moreover, there is a provision
14:36:21 within the arbitration clause that allows for the
14:36:24 parties to either choose to go to AAA or to go to JAMS.

14:36:29 And the JAMS arbitration provisions, which this
14:36:33 particular arbitration is not before, allows for the
14:36:36 rules to include that that arbitrator would determine
14:36:39 arbitrability of any issues given to them.
14:36:42 THE COURT: I have to say that that argument
14:36:45 didn't move me particularly. In other words, this
14:36:47 gateway or threshold question of who decides whether the
14:36:50 claim is arbitrable, I -- I don't see the CBA as, you
14:36:58 know, adopting the rules of JAMS such that it's clear
14:37:01 that the arbitrator is the one who makes that call.
14:37:07 In fact, I thought the way this works is you
14:37:14 go to AAA arbitration; and if, as an alternative, if the
14:37:20 parties agree, you can go to JAMS. So, JAMS is the
14:37:22 second tier, so to speak.
14:37:23 MR. GOLDBERG: That's correct. And the
14:37:25 argument goes that since -- to demonstrate the fact that
14:37:29 the presumption of arbitrability is that strong, the
14:37:33 Union is also offering that additional section to show
14:37:38 that the parties in some fashion had agreed to allow,
14:37:42 under the agreement, to allow these matters to go to
14:37:45 arbitration, even issues of arbitrability.
14:37:48 So in the absence of any language that they
14:37:50 can show that carves out those exceptions, the Union is
14:37:54 offering additional language to show that the parties
14:37:57 had agreed, at least in certain instances, to allow

14:38:01 arbitrability to be decided by the arbitrator.

14:38:03 And we would ask the Court to dismiss the
14:38:10 complaint and allow the case to go to arbitration, which
14:38:13 is now put on the schedule for sometime in March.

14:38:17 THE COURT: All right. Ms. Rozak.

14:38:18 MR. GOLDBERG: Thank you, Judge.

14:38:20 MS. ROZAK: Thank you, your Honor.

14:38:21 Mr. Goldberg, in the Union's first argument,
14:38:26 is that the arbitration clause is broad so, therefore,
14:38:29 there's a presumption of arbitrability, and it can be
14:38:32 viewed two ways: One, I think it could be argued quite
14:38:36 easily and readily that the language is not broad
14:38:40 because although Mr. Goldberg answered your question
14:38:42 that any dispute can be brought forward to arbitration,
14:38:45 I think the contract is quite clear on its face, and it
14:38:48 does not say that. Although Article III(A) does begin
14:38:52 with language that says all disputes arising between the
14:38:56 Union and the company may go to arbitration. It's
14:39:00 clearly modified by III(C), which says that -- and we've
14:39:04 cited this in our papers -- the specific section of the
14:39:07 agreement alleged to have been violated must be put in
14:39:10 writing. So to the extent that he, Mr. Goldberg, is
14:39:14 asserting that the arbitration language of the clause is
14:39:19 broad, I say it has been narrowed by the contract in and
14:39:24 of itself. You can't just read III(A) and skip III(C).

14:39:27 The rules of contract interpretation apply here and are
14:39:29 the overarching rules. And my brother has cited to that
14:39:32 in his opposition that we aren't just abandoning the
14:39:36 rules of contract interpretation here as we argue this
14:39:39 today. Those are the primary rules by which we will
14:39:41 interpret the collective bargaining agreement as well.
14:39:44 So I say that it's narrow because it does
14:39:46 require the contract to be cited, and the Union has
14:39:48 cited the collective bargaining agreement, and they
14:39:50 cited the discipline language. And so the discipline
14:39:54 language is what is at issue. That's -- they cited it
14:39:56 in their grievance, and then they raise it again in
14:40:00 their demand for arbitration. They say, discipline, and
14:40:02 in parens, demotion, not administered according to the
14:40:06 CBA. Their argument has been all along that the
14:40:09 demotion is disciplinary in nature, and they can grieve
14:40:12 that under the collective bargaining agreement. They
14:40:15 can't because the language in the discipline section
14:40:17 under II(A), as you said, your Honor, defines discipline
14:40:21 that is subject to the grievance and arbitration
14:40:24 proceeding as "written warnings, suspensions and
14:40:28 terminations."
14:40:28 So my response to the broad arbitration
14:40:32 clause is even if you were to determine that the
14:40:35 grievance and arbitration language is broad, the

lang -- the cases that I cited, the Trap case and then the -- the *United Steelworkers case versus Rohm*. Both of those have determined that even though there may be a broad arbitration clause, the claim that's being brought forward to arbitration still has to be grounded on the collective bargaining agreement. And I submit to you, your Honor, that their claim, which is that the discipline here, the demotion, was not in accordance with the contract is not subject to being arbitrated.

Now, Mr. Goldberg makes a second argument, which he just argued now, and I -- it appears in his papers as well, which I -- I'll admit I didn't quite understand what he was getting at, but I do now. He's trying to say that because the management rights clause at I(A) is broad, that the Union has unfettered discretion to bring forward claims and say that the -- they're really challenging the management rights clause and how it's being interpreted.

First of all, again, we're limited by the papers that we have here in that the Union hasn't challenged the collective -- I mean hasn't challenged the management rights clause. That's not part of their grievance and it's not part of their demand for arbitration. But this is not a situation where the Union is trying to say the management rights clause

14:42:03 doesn't allow you to do what you did. You overstepped
14:42:06 your bounds, RTA, or as the Union's written brief says,
14:42:11 that we're trying to somehow argue that the collective
14:42:15 bargaining agreement's grievance and arbitration
14:42:18 language trumps the management rights clause. That's
14:42:21 not the case.
14:42:22 The management rights clause, as RTA is
14:42:26 relying on it in its papers, is solely to provide you,
14:42:30 explain to you, what is the source of its right to
14:42:33 demote. Because the contract otherwise doesn't say
14:42:35 anything about demotion. And my brother has raised the
14:42:38 point about well, there's some peripheral language
14:42:41 related to promotions. So you can sort of, you know,
14:42:44 infer from that that demotions are mentioned. They're
14:42:47 not. Demotions are not covered by the collective
14:42:50 bargaining agreement. So the source of RTA's right to
14:42:54 demote is the management rights clause, but we're not --
14:42:56 I'm not asking you to interpret that. I'm just simply
14:43:00 saying that's there for you to look at.
14:43:02 What you need to decide is whether or not
14:43:03 the parties have, under the discipline language in
14:43:07 II(A), agreed to have the Union challenge demotions, and
14:43:13 it hasn't, your Honor. It's a pretty straightforward
14:43:16 contract interpretation matter. The principles of
14:43:19 contract interpretation apply, and the clean -- the

14:43:22 clear and clean language, unambiguous language of the
14:43:26 contact, is that if you're challenging a discipline
14:43:28 matter, Union, it has got to be one that the parties
14:43:31 agreed upon as discipline. And again, it's limited to
14:43:35 the written warnings, the suspensions, and the
14:43:37 terminations.
14:43:38 Just to briefly touch on the Union's JAMS
14:43:44 argument, I think your Honor has raised the points that
14:43:46 we raised in our brief and opposition to the motion to
14:43:50 dismiss, which is we're not talking about a JAMS
14:43:53 situation here because, as you pointed out, it's a
14:43:57 second-tier agreement. So it requires that the parties
14:44:01 not only bypass mutual selection of an arbitrator, but
14:44:06 also bypass selection of an arbitrator through the AAA
14:44:09 process. So we haven't gotten to JAMS yet. But even if
14:44:12 we did get to JAMS, that would require a mutual
14:44:15 selection of the arbitrator. And it may come to pass,
14:44:17 your Honor, that RTA will say in this instance, well,
14:44:20 we're not going to use JAMS, and we refuse to do so,
14:44:23 because by doing so, we would have to submit the issue
14:44:26 of arbitrability to that party, and we won't do that.
14:44:28 And so we're not there. That's not applicable. And
14:44:30 again, it says you say, a second-tier agreement that we
14:44:34 haven't reached in this case.
14:44:35 So I think looking at the case in its most

14:44:39 simplistic terms, the Union has come forward and
14:44:43 categorized or, you know, it -- it said, this
14:44:47 discipline, the demotion, is not in accordance with the
14:44:49 contract. And RTA's response is a demotion is not
14:44:53 discipline. You're not challenging something that the
14:44:57 contract contains. There's no mention of that. You do
14:45:00 not have the right to challenge a demotion, but we do
14:45:03 have the right to administer a demotion through our
14:45:07 management rights clause, but even if you lopped off the
14:45:09 management rights argument that RTA makes, you would be
14:45:13 faced with a question of about have we -- you know, I
14:45:17 believe that you are the gatekeeper to deciding whether
14:45:20 or not this is arbitrable, but even if you were to find,
14:45:22 as I said, that there's a broad arbitration clause, the
14:45:25 presumption of arbitrability can be overcome in this
14:45:28 case by showing you that we have that clear and
14:45:31 unmistakable language that shows we have not agreed to
14:45:34 arbitrate a demotion.
14:45:37 THE COURT: So, if I were to find that
14:45:43 sentence in II(A), it is the understanding of both
14:45:47 parties that discipline is defined as written warnings,
14:45:50 suspensions and terminations, if I were to find that to
14:45:53 be ambiguous or unclear, it would follow, would it not,
14:45:58 that that's not clear and unmistakable evidence of a
14:46:04 carveout to the arbitration, so the end result would be

14:46:07 arbitration, right? In other words, if I can't tell --
14:46:11 MS. ROZAK: I think I would have to concur,
14:46:13 because I -- I -- I am urging you to find that that
14:46:17 sentence is clear and unambiguous; that that is the
14:46:23 universe of discipline, as the parties have agreed, at
14:46:28 least for this contract.
14:46:29 THE COURT: It could say, of course, if the
14:46:32 Union wants to read it -- it could say, discipline is
14:46:36 limited to A, B, and C, warnings, suspensions and
14:46:40 terminations, and no other form is permitted. It
14:46:42 doesn't say that.
14:46:43 MS. ROZAK: You are right, your Honor.
14:46:44 THE COURT: It could say as the company
14:46:46 wants, you know, the discipline is defined in this way,
14:46:49 and all other forms of employ -- you know, and it's only
14:46:52 A, B, and C, and all other forms of discipline are still
14:46:55 on the table as part of management rights.
14:46:57 MS. ROZAK: Yes, your Honor, I would agree
14:46:59 with that. But also, as you say, if you were to read
14:47:03 the contract, as the Union is urging you to, it is
14:47:07 missing the all important language that says, and
14:47:10 this -- you know, and you cannot administer any other
14:47:14 form of discipline, which is, you know, understood in
14:47:18 the general employer-employee rubric as including things
14:47:21 such as verbal warnings or demotions or --

14:47:27 THE COURT: Well, verbal warnings is
14:47:29 mentioned.
14:47:30 MS. ROZAK: Well, actually, you're right.
14:47:31 That is specifically mentioned as something that the
14:47:32 employer may do. But we would have to then sit down and
14:47:36 think about other actions that could be perceived as
14:47:39 disciplinary in nature, and there are many that
14:47:42 employees view as disciplinary.
14:47:46 THE COURT: Such as?
14:47:47 MS. ROZAK: Well, as I stand here today, now
14:47:49 you have me stymied. So let's see. Actually, there are
14:47:56 a host of them, such as -- and I'm not sure if it works
14:48:00 in this setting, but as your hyperbole about painting
14:48:04 the bus pink, moving people's offices. People find that
14:48:06 if they've had to move their office from the area where
14:48:08 all their friends are to someplace else, they have been
14:48:12 moved to Siberia, and that's disciplinary. People who
14:48:16 have to change their lunch hour, that's disciplinary.
14:48:19 And you're disciplining me because, you know, I
14:48:21 complained about X, Y, Z. Or a person is not allowed to
14:48:24 take a day of leave when that's in the discretion of
14:48:27 management, and they say, well, that is arguably
14:48:30 management's discretion, but management never says, no,
14:48:33 you can't take a day of vacation, and now that you're
14:48:37 denying me my leave, my vacation, that's disciplinary.

14:48:40 So we do start to get into the world of actions that the
14:48:44 Union or the individual employee would characterize as
14:48:46 disciplinary in nature, which the parties never ever
14:48:51 thought about when they sat down and negotiated the
14:48:54 contract and said, gee, you're right. I guess, you
14:48:56 know, if we do switch someone's time for lunch, or we do
14:49:00 deny their day of leave, or we do move their office to
14:49:03 another part of the, you know, building that somehow or
14:49:05 other that's been deemed disciplinary. So it's not just
14:49:09 a demotion. It's a whole host of other actions that
14:49:12 individuals would view as disciplinary to them.
14:49:15 THE COURT: All right. Mr. Goldberg,
14:49:23 anything further?
14:49:25 MR. GOLDBERG: Two -- two points, your
14:49:27 Honor.
14:49:28 It seems to me that the argument on behalf
14:49:31 of the RTA have been really trying to have form overcome
14:49:39 substance. You know, the argument where the issue in
14:49:44 terms of this subparagraph C under grievances that we
14:49:47 have to identify the specific section of the agreement
14:49:51 alleged to have been violated, well, reality -- that
14:49:55 doesn't really change all disputes because that's only
14:49:58 if those sections are actually known. And even in this
14:50:02 case, we have identified what that section was. It's an
14:50:06 issue involving discipline, whether or not that

14:50:09 demotion, whether appropriate under the facts of this
14:50:12 case, and whether or not it falls within the collective
14:50:14 bargaining agreement. Those are matters that are
14:50:16 typically reserved for arbitrators, which identified
14:50:21 several cases where arbitrators have ruled on that
14:50:23 particular issue itself.
14:50:24 But just a secondary note, when I was
14:50:28 talking to Attorney Rozak this morning, I noticed that
14:50:32 there was one of the exhibits of the complaint that I
14:50:35 believe was incorrect, and there was an Exhibit F that I
14:50:39 think was meant to be a different document, and I wanted
14:50:43 to have that offered. And let me show it to counsel
14:50:47 first.
14:50:47 (Document shown to Ms. Rozak.)
14:50:47 MS. ROZAK: Yeah, that's it.
14:50:47 MR. GOLDBERG: Okay. And this was the
14:51:12 actual Step 2 response to the grievance and should be
14:51:18 really placed as Exhibit F in the complaint.
14:51:22 I would just call the Judge's attention to
14:51:26 the last paragraph on the first page where it sure
14:51:29 appears at least on its face as part of the complaint
14:51:33 that there is this egregiousness of conduct that is so
14:51:38 severe that it could have been warranted for
14:51:40 termination, but in lieu it ended up being a demotion,
14:51:43 that they're using this demotion as a disciplinary tool.

14:51:48 And again that goes back to the arbitrators of whether
14:51:51 or not that is in a proper form of discipline in the
14:51:55 interpretation of that contract.
14:51:56 Thank you, your Honor.
14:51:58 THE COURT: All right. Let's mark the
14:52:06 June 14th, 2011, letter as Exhibit 1 to this hearing.
14:52:10 (Exhibit No. 1 was admitted into evidence.)
14:52:12 THE COURT: Just give me a moment here.
14:52:59 All right. I think, as I indicated, the
14:53:02 first question is the easier one, and that is whether
14:53:05 the Court or the arbitrator decides whether the claim is
14:53:07 arbitrable. I think under the circumstances here, for a
14:53:11 reason set forth in the RTA's brief, clearly the matter
14:53:17 is for the Court. It's not expressly or even appliedly
14:53:25 granted to the arbitrator under the circumstances
14:53:29 presented here.
14:53:30 And the JAMS rules, I think, are not
14:53:40 incorporated under the circumstances presented,
14:53:43 particularly when both parties have to mutually assent
14:53:46 to JAMS arbitration, rather than AAA arbitration.
14:53:50 The more difficult issue is whether the
14:53:53 substantive question is arbitrable.
14:53:57 I interpret III(A) as being a broad
14:54:04 presumption of arbitrability. It says this grievous --
14:54:07 grievance procedure, which of course includes

14:54:09 arbitration, shall apply to all disputes arising between
14:54:12 the Union and the Company whether any such dispute
14:54:15 occurs as a result of a complaint by an individual
14:54:17 member of the Union or a complaint by the Union itself.
14:54:20 That leads to the question is it all
14:54:25 disputes arising between the Union and the Company, or
14:54:28 all disputes arising out of the CBA. I think the answer
14:54:32 is the latter, that is, the grievance procedure, the
14:54:35 arbitration procedure applies to all disputes arising
14:54:38 out of the CBA.
14:54:39 It certainly -- again, this document could
14:54:43 be drafted a whole lot more clearly, to say the least,
14:54:48 but I think III(A), III(C) and I(A) taken together
14:54:53 clearly suggest that what is arbitrable are disputes
14:54:58 arising out of the CBA. Otherwise, the management
14:55:04 rights withhold makes no sense among other things.
14:55:07 That takes us to the discipline clause. It
14:55:13 could be read in a number of different ways. The
14:55:22 Transit Authority says that it's a definition. It
14:55:28 defines discipline to mean three different things:
14:55:31 Written warnings, suspensions, and terminations. That's
14:55:34 the universe of discipline identified under the CBA, and
14:55:42 therefore, that's the universe of discipline to which
14:55:46 the grievance procedure and the arbitration rights
14:55:49 attach.

14:55:50 That is by no means a frivolous
14:55:54 interpretation. The Union's interpretation is that this
14:56:05 is a limiting clause; that these are the only ways in
14:56:09 which discipline may be imposed, that is, written
14:56:12 warnings, suspensions or terminations. It's meant to
14:56:15 confine the company. That too is not a frivolous
14:56:22 definition.
14:56:24 There is a third interpretation in context,
14:56:28 which is that it's meant to emphasize that the
14:56:34 procedure, the disciplinary procedure and the grievance
14:56:37 procedure, does not apply to verbal warning and
14:56:39 cautions, but only to written warnings, suspensions and
14:56:43 terminations, and that the drafts -- drafters of the CBA
14:56:52 hadn't -- it hadn't occurred to them to mention
14:56:56 demotions, and that written warnings, suspensions and
14:57:00 terminations are meant as a -- as distinct from verbal
14:57:04 warnings or cautions to which the grievance procedure
14:57:07 doesn't apply.
14:57:07 The way out of this morass is by no means
14:57:14 clear to me, and I think under the circumstances the law
14:57:20 requires me to find that this dispute is arbitrable
14:57:25 because it isn't clear. It isn't unmistakable. It
14:57:31 isn't so definite or so forceful or so obvious that
14:57:37 it's -- that conclusion is required.
14:57:40 I do that with some misgivings, simply

because I'm struggling to figure out what the CBA actually says or means.

And I certainly would have greater confidence in my decision if I could say the document clearly means X or Y or Z. But it is susceptible of different meanings, whether it's intended as a -- a list of limitations as instructions and so on is -- is very much up in the air; and therefore, because it's not clear, because it's not unmistakable, I do think it's subject to the grievance procedure.

And to state the obvious, I -- this is a decision strictly about arbitrability. I take no position at all about whether anyone is acting in good faith or not and whether or not Mr. Rossi had the discipline coming to him that he received. It's strictly a question of -- of arbitrability; and therefore, I'm compelled having found the dispute is arbitrable to grant the motion to dismiss.

I guess, let me stop there. In terms of the granting of the motion, is there any residual nonarbitrable piece of this that would -- where it would make sense for me to retain jurisdiction or to stay the proceedings pending arbitration? I don't think anyone asked for that.

Ms. Rozak, is this all-or-nothing?

14:59:38 MS. ROZAK: I think this is all-or-nothing, your Honor, correct.

14:59:40 THE COURT: All right. Mr. Goldberg, I take it you agree?

14:59:42 MR. GOLDBERG: I concur.

14:59:43 THE COURT: All right. All right. Then I will grant the motion to dismiss. It -- I'm not picking on any of you. Probably this document goes back decades and has been added to over the years, but it certainly would help if documents such as this were written more clearly so at least we would know what the parties had intended and bargained for; but in any event, I have to deal with what's in front of me and do the best I can under the circumstances.

15:00:21 So, thank you. It was well argued, but the motion to dismiss is granted.

15:00:28 Okay. Thank you.

15:00:30 (At 3:00 p.m., Court was adjourned.)

C E R T I F I C A T E

I, Marianne Kusa-Ryll, RDR, CRR, do hereby certify that the foregoing transcript, consisting of 28 pages inclusive, is a true and accurate transcription of my stenographic notes in Case No. 11cv40222, Regional Transit Authority Transit Services versus Amalgamated Transit Union, Local 22, before F. Dennis Saylor, IV, on February 13, 2012, to the best of my skill, knowledge, and ability.

/s/ Marianne Kusa-Ryll — 2/16/12

Marianne Kusa-Ryll, RDR, CRR — Date

Official Court Reporter